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# In the Supreme Court of the United States

OCTOBER TERM, 1982

PALLAS SHIPPING AGENCY, LTD., PETITIONER

*v.*

JOSEPH DURIS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

RICHARD G. WILKINS
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

T. TIMOTHY RYAN, JR.
*Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

MARY-HELEN MAUTNER
*Counsel for Appellate Litigation*

SANDRA D. LORD
*Attorney*

*Department of Labor*
*Washington, D.C. 20210*

## QUESTION PRESENTED

Whether, in the absence of an award in a formal compensation order, an employee's acceptance of workers' compensation payments triggers an assignment to the employer of the employee's right to recover damages from a third party under Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b).

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

### INTEREST OF THE UNITED STATES

This case involves the proper application of the assignment provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, to the tort action of an employee against a responsible third party. The Secretary of Labor, the government official charged with the responsibility of administering the complex statutory provisions of the LHWCA, has a substantial interest in assuring that the Court has before it an accurate picture of the administrative procedures involved in this litigation and of the possible impact of the parties' positions on these procedures.

### STATEMENT

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*, provides maritime employees with a comprehensive workers' compensation scheme for disability or death resulting from

injuries occurring on or adjoining navigable waters. Administration of the Act is vested in the Secretary of Labor, 33 U.S.C. 939, who has delegated this responsibility to the Department of Labor's Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 701.201-701-203. See *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 5 n.10.

Compensation payable under the LHWCA is the employee's exclusive source of recovery from the employer. 33 U.S.C. 905(a). The LHWCA, however, preserves the employee's right to recover full damages from a negligent third party, commonly the vessel owner. 33 U.S.C. 905(b), 933(a). Under Section 33 of the Act, 33 U.S.C. 933,[1] the provision at issue here, an employee who accepts "compensation under an award in a compensation order filed by the deputy commissioner or [the Benefits Review] Board" retains the right to sue a responsible third party for six months; thereafter the employee's right to sue a third party is irrevocably assigned to the employer. 33 U.S.C. 933(b).

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[1]Section 33 of the LHWCA, 33 U.S.C. 933, provides in pertinent part:

> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

See *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981).[2]

Unless an employer controverts its liability under the Act, it must pay compensation to a disabled employee or his survivors beginning two weeks after it has knowledge of the employee's injury or death. 33 U.S.C. 914; 20 C.F.R. 702.231-702.232. If the employer does not contest a claim, compensation is paid voluntarily, *without an award*, and an appropriate form, Form LS-206 ("Payment of Compensation Without Award"), is filed with the deputy commissioner in the Department of Labor. 33 U.S.C. 914; 20 C.F.R. 702.234. Should an employer thereafter terminate payments, an appropriate form, Form LS-208 ("Compensation Payment Stopped or Suspended"), is filed with the deputy commissioner. 33 U.S.C. 914(c); 20 C.F.R. 702.234. The employee has one year from receipt of the last payment made without an award in which to file a claim for compensation payments under the Act. 33 U.S.C. 913(a).

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[2]The employer has a lien against its employee's recovery from a responsible third party for the full amount of its compensation obligations. 33 U.S.C. 933(f). See *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980); *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 674 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976). If the employee settles an action against a third party for an amount less than the value of the employer's compensation liabilities without the employer's written consent, the employer is released from any further obligation to pay compensation. 33 U.S.C. 933(g). Should the employer, as assignee of the employee's claim, recover from a culpable third party, the employer retains the amount of its compensation obligations and its litigation costs, and 20% of the excess. The remaining 80% of the excess is payable to the employee. 33 U.S.C. 933(e); *Rodriguez* v. *Compass Shipping Co.*, *supra*, 451 U.S. at 600-601. The employer also has a non-statutory right of action against a responsible third party for indemnification in the amount of the compensation awarded. Pet. App. A4; *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969); *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, *supra*, 528 F.2d at 673.

When an employer controverts a compensation claim, the deputy commissioner is notified either by the employer's filing of a notice of controversion (33 U.S.C. 914(d); 20 C.F.R. 702.251) or by the employee's filing of a notice of a contested claim (20 C.F.R. 702.261). Filing of either notice activates the administrative adjudication procedures described in regulations promulgated by the Department of Labor. 20 C.F.R. 702.301-702.394. Contested claims, if carried to formal hearings, result in the issuance of formal compensation orders containing appropriate findings of fact and conclusions of law. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.348-702.349. These formal compensation orders are enforceable in federal district court under the procedures set out in 33 U.S.C. 918 and 921(d). See also 20 C.F.R. 702.372.

Where agreement between the parties is reached before the formal hearing stage, the agreement is embodied in a memorandum placed in the administrative file of the deputy commissioner. 20 C.F.R. 702.315. Either party can thereafter request and obtain a formal compensation order. 20 C.F.R. 702.315(a) ("If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file and serve such order * * *").

Under the statute and administrative practice, a "compensation order" is a well-defined instrument with a variety of legal effects; no lesser document is afforded its legal significance. A compensation order is always filed and served by a deputy commissioner, a person specifically appointed as the delegate of the Secretary of Labor. 33 U.S.C. 939, 940; 20 C.F.R. 701.201-701.203.[3] Compensation orders, but not memoranda of settlement agreements,

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[3]The authority to issue compensation orders is not delegated to claims examiners, although they may issue memoranda of agreements. 20 C.F.R. 702.312, 702.315.

are reviewable by the Benefits Review Board. See generally 33 U.S.C. 919(c), 919(e), 921(a), 921(b)(3). Most important, compensation orders are enforceable in court. 33 U.S.C. 918, 921(d). Memoranda of agreements, even if they refer to an "award," are never filed in the form of or served as compensation orders and do not have the binding and conclusive effect of such orders. Thus, if only a memorandum of agreement is on record, the employer is free to stop compensation payments and litigate its liability under the Act.[4]

2. Respondent Joseph Duris was injured in May 1975 while working as a longshoreman on a vessel in the port of Toledo, Ohio. Shortly after his injury, Duris began to receive LHWCA compensation payments from his employer. It is undisputed that Duris' benefits were paid voluntarily; the deputy commissioner entered no compensation order or award in this case (Pet. App. A2). On June 2, 1975, Form LS-206, "Payment of Compensation Without Award," was issued by the employer's claims adjuster (Br. in Opp. App. A1). On April 26, 1977, Duris' employer terminated the payment of benefits by filing Form LS-208, "Compensation Payment Stopped or Suspended" (Pet. 2; Pet. App. A2).

In April 1980, Duris filed a personal injury suit against petitioner Pallas Shipping Agency, Ltd., in the United States District Court for the Northern District of Ohio. The

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[4]Once a formal compensation order has been issued, the employer's obligation to pay is enforceable in court and delays in payment automatically trigger statutorily prescribed penalties. 33 U.S.C. 914(f). By contrast, if an employer agrees to make payments, as reflected in a memorandum filed after an informal conference, the provisions of the LHWCA controlling payments without an award apply. 33 U.S.C. 914(e). Under these provisions, the employer is free to change its position, file a "notice of controversion," and terminate payments — without incurring additional liability. 33 U.S.C. 914(d), 914(e).

district court dismissed the action for lack of in personam jurisdiction over Pallas.[5] The court did not reach the question whether Duris had lost his right to sue by the operation of the assignment provisions of Section 33(b) of the LHWCA, 33 U.S.C. 933(b).

The court of appeals reversed, holding that jurisdiction over Pallas Shipping Agency, Ltd., had been established.[6] The court of appeals also resolved the assignment issue not addressed by the district court.[7] The court ruled that, based on the "purposeful use of the term 'award' " in Section 33(b) of the LHWCA, no assignment of Duris' cause of action had occurred because his employer had paid benefits voluntarily without an award (Pet. App. A2-A3, A8-A9). The court held that "the mere receipt of compensation benefits under the Act does not trigger the assignment provisions of section 33(b)" (Pet. App. A8). Thus, "[w]here, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months" (*ibid.*).

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[5]Erato Shipping was the dry boat charterer of the vessel on which Duris was injured. Erato was subsequently merged into petitioner Pallas Shipping Agency, Ltd. (Pet. App. A2). The district court concluded that "service of process against Pallas shipping was improper because that company had never done any business in Ohio" (*id.* at A8).

[6]The court found that, following a merger, the surviving corporation is liable for the claims against each constituent corporation. "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles" (Pet. App. A9). Petitioner did not raise the jurisdictional issue in its petition for a writ of certiorari, and the propriety of the court of appeals' finding of in personam jurisdiction in this case is not before the Court (Pet. 4).

[7]Petitioner raised the Section 33(b) assignment issue before the court of appeals as an alternative ground upon which to affirm the decision of the district court (Pet. App. A2).

## SUMMARY OF ARGUMENT

1. The court of appeals correctly held that, absent a formal award embodied in an official compensation order, the assignment provisions of Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b), are not triggered by an injured employee's acceptance of compensation. Congress deliberately employed a term of art in describing the event that would activate the assignment provisions: "an award in a compensation order filed by the deputy commissioner or Board." Such precise wording must be given its full intended effect.

The legislative history of the LHWCA demonstrates that Congress amended Section 33(b) in 1938 to make assignment of an employee's third-party rights contingent upon the filing of a formal compensation order. The express purpose of this amendment was to alleviate hardship on employees who might unwittingly assign away their rights to sue third-party tortfeasors simply by accepting statutory benefits from their employers. The perceived need for such protection was undiminished in 1959, when Section 33 was again amended and Congress intentionally retained the requirement of a formal award.

2. Contrary to petitioner's contention, insistence on a formal award does not impede the provision of prompt compensation to injured workers. Employers need not refuse to make payments and litigate their liability in administrative proceedings in order to obtain formal compensation orders. Under the Department of Labor's regulations and practices, a party to an informal compensation agreement may obtain a formal compensation order on request. Employers, moreover, may avail themselves of an independent tort action to recoup the amount of compensation benefits paid as the result of a third party's negligence. Thus, compliance with the plain terms of Section 33(b) does not burden employers or retard the compensation process.

3. A rule permitting anything less than a formal compensation order to trigger the assignment provisions of Section 33(b) would frustrate a major purpose of the LHWCA's third-party liability provisions. The underlying premise of Section 33(b) is that third-party tortfeasors ultimately should be held liable for any damages caused by their negligence. Petitioner's construction of the Act, however, bars otherwise meritorious suits by injured employees, allowing many third-party tortfeasors to escape liability, merely because a workers' compensation scheme is in place.

## ARGUMENT

### I. THE PRECISE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 33(b) MAKE A FORMAL COMPENSATION ORDER AN ABSOLUTE PRECONDITION TO OPERATION OF THE ASSIGNMENT PROVISIONS OF THE LHWCA

Section 33(b) of the LHWCA identifies in unambiguous terms the event necessary to trigger assignment to the employer of an employee's cause of action against a third party: acceptance of compensation "under an award in a compensation order filed by the deputy commissioner or Board." 33 U.S.C. 933(b). Congress' use of such precise language in the context of a detailed regulatory statute must be given its full effect. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). See also *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 604 (1981) (statutory language of the LHWCA must be regarded as conclusive, absent a clearly expressed legislative intention to the contrary); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As utilized throughout the LHWCA, the term "compensation order" has a clearly defined meaning. Compensation orders are binding upon employers and are enforceable in

court. 33 U.S.C. 918, 921(d). An employer's firm statutory obligations under a compensation order contrast significantly with the more flexible procedures that prevail when compensation payments are made without a formal award. 33 U.S.C. 914(d), 914(e). Because of the distinction drawn by the LHWCA between compensation payments made with and without a formal compensation order, there is no basis for deviating from the express statutory language in construing Section 33(b) of the Act. Acceptance of compensation "under an award in a compensation order filed by the deputy commissioner or Board" is an absolute prerequisite to the statutory assignment of an employee's third-party rights to his employer. 33 U.S.C. 933(b).[8]

In light of the lack of any ambiguity in the statute itself, no inquiry into the legislative history of Section 33(b) is necessary. *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *TVA* v. *Hill*, 437 U.S. 153, 184 n.29, 187 n.33 (1978). In any event, however, the legislative history of the LHWCA demonstrates conclusively that Congress' utilization of the critical phrase in Section 33(b) was deliberate. As the court below properly recognized (Pet. App. A3), such purposeful language must be honored.

Before enactment of the LHWCA in 1927, maritime employees had the right to bring maritime tort actions

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[8]Contrary to petitioner's assertion, this Court's ruling in *Rodriguez* v. *Compass Shipping Co.*, *supra*, did not establish "that the entry of a formal award in a compensation order is not required to support an assignment under § 933(b)" (Pet. Br. 14). The Court in *Rodriguez* declined to address whether settlement agreements or other administrative procedures are "equivalent to formal orders for purposes of § 33(b)" (451 U.S. at 598-599 n.3). Rather, the Court simply assumed that the prerequisites to a Section 33(b) assignment had been met in that case (*ibid.*).

against negligent third parties.[9] The 1927 Act did not eliminate this right, but did require an injured worker to elect between accepting compensation and seeking damages from a responsible third party. Section 33, 44 Stat. 1440. If the injured worker accepted compensation, the worker's right of action against the third party was assigned automatically to the employer. 44 Stat. 1440.[10] Under the original Act, nothing more than the acceptance of compensation was required to evidence the employee's election. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 604; *American Stevedores, Inc.* v. *Porello,* 330 U.S. 446, 454 n.18 (1947).

The election of remedies requirement was modified in the 1938 amendments to the LHWCA. Congress changed the event that triggered an election and assignment from mere acceptance of "compensation" to acceptance of "compensation under an award in a compensation order filed by the deputy commissioner." Section 14, 52 Stat. 1168. Thus, an employee would not be required to elect between accepting

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[9]For general discussions of a LHWCA claimant's right to seek damages from a third party and the history of Section 33 of the Act, see *Bloomer* v. *Liberty Mutual Insurance Co.,* 445 U.S. 74, 79-81 (1980), and *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 604-612.

[10]As originally enacted, and until 1938, Section 33 of the LHWCA read in pertinent part (44 Stat. 1440):

> (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

compensation and seeking damages from a responsible third party *unless* the compensation was paid under an award by a deputy commissioner. 52 Stat. 1168.[11] By reducing the danger that an employee would make an election without being advised of its consequences, amended Section 33(b) shielded employees from the harsh consequences of an improvident election. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 605. As the House Committee explained (H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9 (1938)):

> The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person * * * to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury.

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[11]From 1938 until 1959, Section 33(b) of the LHWCA provided (52 Stat. 1168):

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

At the time of the enactment of the 1938 amendments to the LHWCA, the phrase "compensation order filed by the deputy commissioner" carried the same technical meaning that it does today. See Section 19, 44 Stat. 1435-1437. A compensation order was a formal document filed by a deputy commissioner. 44 Stat. 1435-1437. Statutory penalties attached automatically to violation of a compensation order (the employer could not terminate payments and relitigate liability without incurring a penalty), and the order itself was enforceable in federal district court. Sections 14 and 19, 44 Stat. 1432-1433, 1435-1437. Congress deliberately employed a term of art in the 1938 amendments and did not intend anything less than a formal award in a compensation order to satisfy the condition precedent to the assignment of an employee's cause of action. *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 456.[12] See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 127 n.2 (1956) ("A longshoreman, after accepting compensation payments from his employer without an award, may sue a third-party tortfeasor for his injuries").

The legislative history of the LHWCA since 1938 reveals that Congress has not retreated from the explicit requirement of an award in a formal compensation order prior to

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[12]The issue in *Porello* was whether acceptance of compensation without an award resulted in an *election* by the employee not to sue a third party. This Court took it as a given that, after the 1938 amendments, mere acceptance of compensation did not operate as an *assignment*. "[Section] 33(b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor * * *." *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 454. Reasoning that "election not to sue a third party and assignment of the cause of action are two sides of the same coin," 330 U.S. at 455, the Court held that mere acceptance of compensation was also insufficient to effect an *election* under Section 33(a). 330 U.S. at 454-456.

assignment of an employee's third-party rights under Section 33(b). Indeed, Congress has added additional safeguards to prevent an employee from unwittingly losing the right to sue third parties.

In 1959, Congress extensively amended Section 33 of the LHWCA (73 Stat. 391). These amendments were based on Congress' recognition that, under existing law, injured employees generally did not pursue third-party actions because of the election of remedies requirement and the need for speedy compensation payments to meet current expenses. *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 80 (1980). The 1959 amendments, therefore, abolished the election requirement that had previously faced injured employees, and additionally gave them a six-month period during which they could accept payments under a compensation order without losing a potential cause of action to their employers.

Section 33(a) of the Act was amended to provide that an employee "need not elect" whether to receive compensation or recover damages from a third-party tortfeasor. 73 Stat. 391. Section 33(b), in turn, was amended to permit an employee to accept payments under an award in a compensation order for six months before the right to sue responsible third parties would be assigned to the employer. 73 Stat. 391. Thus, following the 1959 amendments, an employee's third-party right of action is assigned to the employer only by (1) the acceptance of compensation under a formal compensation order and (2) the passage of six months. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 602-603.

The 1959 amendments expressly retained the phrase "compensation under an award in a compensation order filed by the deputy commissioner" in Section 33(b) of the Act. The congressional intent in preserving this and other language of Section 33 was "to continue the current judicial construction of much of the section." Analysis of Bill

to Amend Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 105 Cong. Rec. 9226 (1959). Judicial construction of Section 33(b) at the time of the 1959 amendments precluded an assignment under the Act without an award in a compensation order. In 1947, for example, this Court wrote that "mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor." *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 454. See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp., supra,* 350 U.S. at 127 n.2.[13] Congress reaffirmed in 1959, therefore, that the protection of an official compensation order must be afforded an injured employee who, because of the informality of the voluntary compensation procedures under the LHWCA, might otherwise unknowingly forfeit his right to sue a third-party tortfeasor simply by accepting benefits. When a formal compensation order is served on the employee (20 C.F.R. 702.349), the employee is put on notice by the plain language of the statute that any suit to recover damages from a third party must be brought within six months.[14]

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[13]In *Grasso* v. *Lorentzen,* 149 F.2d 127 (2d Cir.), cert. denied, 326 U.S. 743 (1945), the court of appeals held that where an employer voluntarily made payments and there was no award under the Act, no assignment under Section 33(b) of the LHWCA occurred. In dictum, however, the *Grasso* court said the award required by Section 33(b) could be "informal." 149 F.2d at 128-129. The dictum in *Grasso* was revived 30 years later by the Fourth Circuit in *Liberty Mutual Ins. Co.* v. *Ameta & Co.,* 564 F.2d 1097, 1102 (1977), a principal case relied upon by petitioner (Pet. 10-11).

[14]In this case, there was nothing in the events following his injury to alert respondent Duris to the possibility that he could lose his right to sue petitioner simply by accepting compensation from his employer's claims adjuster. Even if Duris had an inkling that the assignment provisions of Section 33(b) of the LHWCA might be called into play by his acceptance of compensation payments, he would surely have been

Despite the clear statutory terms and legislative history of Section 33(b), the Second and the Fourth Circuits do not require an award in a formal compensation order prior to effectuating an assignment under the statute. The Fourth Circuit has ruled that the assignment provisions of Section 33(b) are triggered, in effect, whenever an injured employee accepts a compensation payment from his employer. In *Simmons* v. *Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982), cert. denied, No. 82-56 (Oct. 12, 1982), the court reached this result by holding that "an award in a compensation order" within the meaning of Section 33(b) is created by three events:

> (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments.

See also *Liberty Mutual Ins. Co.* v. *Ameta & Co.*, 564 F.2d 1097, 1101-1103 (4th Cir. 1977).

The Second Circuit agrees with the Fourth that a formal award in a compensation order is not required to begin the six-month period that must expire prior to assignment under Section 33(b). The Second Circuit, however, disagrees with the Fourth on the events that commence the running of the period. The Second Circuit has concluded that the six-month period begins when the total amount of compensation benefits to be received by the injured worker is fixed — whether by formal order, informal award, or stipulation of the parties. *Verderame* v. *Torm Lines*, 670

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disabused of that notion if he had consulted the statute, which refers to an assignment following acceptance of payments "under an award." The employer's notice to Duris was entitled, "Payment of Compensation *Without* Award" (Br. in Opp. App. A1) (emphasis added).

F.2d 5, 7 (2d Cir. 1982).[15] See also *D'Amico* v. *Cia de Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982); *Ambrosino* v. *Transoceanic Steamship Co.*, 675 F.2d 470, 471-472 (2d Cir. 1982); *Rodriguez* v. *Compass Shipping Co.*, 617 F.2d 955, 957 (2d Cir. 1980), aff'd on other grounds, 451 U.S. 596 (1981).

The above decisions, in effect, cut off an injured employee's right to sue a third-party tortfeasor simply because the employee accepts compensation under the LHWCA. In reliance on these decisions, petitioner would force an injured employee to refuse compensation payments in order to preserve the right to sue beyond six months. This result, as the court below noted (Pet. App. A6), returns the LHWCA to its pre-1938 "election of remedies" condition, notwithstanding the fact that the election requirement of the original Act was eliminated by Congress in 1959.[16]

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[15]The question of when an employee has received adequate knowledge that the total amount of his compensation has been "fixed" seems to call for case-by-case adjudication. See *Verderame* v. *Torm Lines, supra*, 670 F.2d at 7. The Second Circuit's test thus creates considerable uncertainty as to who can bring the employee's cause of action against a third-party tortfeasor.

[16]The Fourth Circuit stated that the six-month period provided by the 1959 amendments protects a worker from a harsh election of remedies decision. *Simmons* v. *Sea-Land Services, Inc., supra*, 676 F.2d at 109. The practical protection provided by the six-month period is scant, however, because the worker is rarely aware that the acceptance of compensation benefits significantly compresses the time within which any suit against a third party must be brought. See Pet. App. A6; *Dunbar* v. *Retla Steamship Co.*, 484 F. Supp. 1308, 1311 (E.D. Pa. 1980). Moreover, the legislative history of the 1959 amendments to Section 33 of the LHWCA does not evidence any intent to cut back on the remedies available to employees after the 1938 amendments to the Act, when employees could accept compensation without an award and still sue a third party. *American Stevedores, Inc.* v. *Porello, supra*, 330 U.S. at 454.

The explicit terms of Section 33(b) and its legislative history bar the result reached by the Second and Fourth Circuits. Congress has expressly provided that an injured employee cannot be deprived of a cause of action against a third-party tortfeasor prior to the issuance of an official compensation order. See *Dunbar* v. *Retla Steamship Co.*, 484 F. Supp. 1308, 1311 (E.D. Pa. 1980). The decisions of the Second and Fourth Circuits fail to provide a persuasive basis for disregarding the clear terms of Section 33(b).

## II. SECTION 33(b)'S EXPLICIT REQUIREMENT OF A FORMAL COMPENSATION ORDER DOES NOT IMPEDE THE PROMPT PAYMENT OF COMPENSATION TO INJURED WORKERS OR IMPOSE UNDUE BURDENS ON EMPLOYERS

In abandoning the requirement of a formal compensation award, the Fourth Circuit was motivated principally by the desire to foster the prompt payment of compensation to injured employees by not clogging the administrative process. *Simmons* v. *Sea Land Services, Inc., supra,* 676 F.2d at 109; *Liberty Mutual Ins. Co.* v. *Ameta & Co., supra,* 564 F.2d at 1103. See also *Larson* v. *Associated Container Transportation (Australia) Ltd.*, 459 F. Supp. 561, 564 (E.D. Va. 1978). The decisions in the Second Circuit appear to proceed on similar grounds. See, *e.g., Rodriguez* v. *Compass Shipping Co., supra,* 617 F.2d at 959.[17] Petitioner (Pet. Br. 15) and these courts erroneously assume that if a

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[17]In *Rodriguez* v. *Compass Shipping Co., supra,* the parties to an informal compensation agreement contemplated that a formal compensation order would be filed. The formal order, however, was not forthcoming, even though issuance was required by Department of Labor regulations. 617 F.2d at 959. In these circumstances, the court concluded that "[t]o delay the operation of § 33(b) until the filing of [a formal compensation] order would be to exalt form over substance" (*ibid.*). Although the result in *Rodriguez* may be understandable on its peculiar facts, the Second Circuit has expanded its "form over substance" analysis to widely divergent factual situations where departure

formal compensation order is held to be a necessary precondition to the operation of Section 33(b), employers will be forced to controvert and litigate their liability in adminiitrative proceedings for the purpose of obtaining a compensation order. *Simmons* v. *Sea-Land Services, Inc., supra,* 676 F.2d at 109; *Liberty Mutual Ins. Co.* v. *Ameta & Co., supra,* 564 F.2d at 1103, *Larson* v. *Associated Container Transportation (Australia) Ltd., supra,* 459 F. Supp. at 564. Such a result would "deny the injured person prompt monetary and medical assistance at a time when he needs it the most" (Pet. 10, quoting *Larson* v. *Associated Container Transportation (Australia) Ltd., supra,* 459 F. Supp. at 564).

In reality, however, employers are not required to litigate liability in order to obtain a formal compensation order. Where payments are made voluntarily, as in this case, the employer may obtain a compensation order simply by requesting one. Deputy commissioners will issue compensation orders on request where there is no disagreement among the parties. See 20 C.F.R. 702.315(a). The employer certainly need not discontinue compensation payments to obtain a compensation order.

By the same token, filing a notice of controversion does not necessarily entail cessation of payments. Where a notice of controversion is filed and the claim is resolved via the informal procedures established by the Department of Labor, the deputy commissioner is required by regulation to issue a compensation order on request. 20 C.F.R. 702.315. Furthermore, the appropriate payments must be

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from the clear statutory language of Section 33(b) cannot be justified by an appeal to equity. See, *e.g., Verderame* v. *Torm Lines, supra,* 670 F.2d at 7 (an award in a compensation order within the meaning of Section 33(b) may be established by stipulation of the parties or "informal award").

made without awaiting receipt of the formal compensation order. *Ibid.* See *Intercounty Construction Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975). Thus, contrary to petitioner's contention (Pet. Br. 15), a plain, straightforward reading of Section 33(b)'s language will not result in unnecessary litigation or undue delay in compensation payments.

Insistence on a formal compensation order also works no substantial hardship on employers. As noted above, the employer may obtain a formal compensation order on request. 20 C.F.R. 702.315. Moreover, although requiring a compensation order prior to a Section 33(b) assignment would affect when an employer receives a statutory assignment of an employee's third-party rights, it does not materially affect the employer's opportunities to recoup its compensation payments. Even if the employer does not obtain an assignment under Section 33(b), the employer has an equitable lien, in the amount of its compensation obligations, on any recovery by the employee. 33 U.S.C. 933(f). Similarly, if the employee settles with a third party for less than the employer's liabilities without the employer's consent, the employer is released from further compensation payments. 33 U.S.C. 933(g). Finally, the employer has an independent cause of action against the third-party tortfeasor in indemnification for the amount of its compensation liabilities. *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969).[18] In these circumstances,

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[18]Unlike the recoveries noted above, Section 33(e) of the LHWCA does give employers who pursue an assigned cause of action a 20% "bounty" on any damages awarded in excess of their litigation and compensation costs. 33 U.S.C. 933(e). See note 2, *supra*. Employers, however, rarely take advantage of this statutory incentive for employer-initiated litigation. As the court below recognized (Pet. App. A7-A8), the usual continuing relationship between stevedoring employers and their clients — the vessel owners or charterers — operates to discourage employers from pursuing the assigned claims of their employees. See *Dunbar* v. *Retla Steamship Co.*, *supra*, 484 F. Supp. at 1311-1312 n.5.

where obtaining a compensation order is neither onerous to the employer nor a detriment to the prompt payment of compensation benefits, the unambiguous terms of Section 33(b) should control.[19]

## III. ABANDONMENT OF THE FORMAL AWARD REQUIREMENT VITIATES A BASIC PRINCIPLE OF WORKERS' COMPENSATION LAW UNDERLYING SECTION 33(b)

As noted above, the position espoused by petitioner does not directly benefit injured employees or their employers. The real beneficiaries of petitioner's construction of Section 33(b) are third-party tortfeasors, who gain a technical defense that enables them to evade liability in clear contravention of legislative intent.

Section 33 of the LHWCA, as amended in 1938 and 1959, is designed to facilitate suits against third parties. Indeed, the fundamental premise of Section 33 is that third-party tortfeasors should not be relieved of their legal liabilities solely because a workers' compensation program governs the rights of employers and employees with respect to each

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An employer's dependence on its clients for future business reduces the employer's willingness to bring suit despite the financial incentives of Section 33(e). See *Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability): Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act Before the Special Subcomm. of the House Comm. on Education and Labor*, 84th Cong., 2d Sess. 61 (1956).

[19]Section 33(b) is not the only provision of the LHWCA that refers to compensation payments under an award or a compensation order. See, *e.g.*, 33 U.S.C. 913(a), 919(c), 921(a), 921(d), 922. Petitioner's contention that a formal compensation order is not required under Section 33(b), if accepted by this Court, could engender confusion for the future administration of these other sections of the Act. For example, an employee might argue that something less than a formal compensation order creates an obligation that is enforceable in district court. See 33 U.S.C. 921(d). See generally pages 4-5, *supra*.

other. As Arthur Larson, author of the leading workers' compensation treatise[20] and former Under Secretary of Labor, remarked before a congressional committee that was examining Section 33 of the LHWCA:

> The whole idea of third-party procedure, of course, is simply this: Occasionally in a workman's compensation situation a stranger will be involved, a stranger to the compensation, the third-party wrongdoer, and there is no reason why his liabilities should be affected in the slightest by the existence of a workmen's compensation relation between two other people. So when this third-party stranger is the tort feasor who caused the accident, it is quite possible that a new set of adjustments should take place, the *ultimate objective being that he, being the wrongdoer, should pay up in full as he would have done in any case* * * *.

*Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability): Hearing on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act Before the Special Subcomm. of the House Comm. on Education and Labor*, 84th Cong., 2d Sess. 15-16 (1956) ("*Hearings*") (emphasis added). See also *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1042 (4th Cir. 1980); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8, 10-12 (1972); H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 4, 6-8 (1972).

Petitioner's construction of Section 33(b) thwarts the ultimate objective of the legislation: imposing liability on third-party wrongdoers. Petitioner's position, if adopted, would prevent injured employees from pursuing meritorious third-party claims simply because they accepted compensation payments voluntarily profferred by their

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[20] 2A A. Larson, *The Law of Workmen's Compensation* (1976).

employers without a formal compensation order. While an employer could litigate the claim following assignment, this possibility has proven to be more hypothetical than real. An employer's dependence on vessel owners and charterers —the likely defendants in a third-party action — significantly reduces its willingness to bring suit. See *Hearings, supra,* at 16; note 18, *supra.* As a result, petitioner's reading of Section 33(b) reduces the practical extent of third-party liability under the Act.

Failure to hold third parties liable for their torts imposes costs on the LHWCA compensation system that are outside the scope of the basic compromise that led to its creation. Workers' compensation schemes are designed to provide prompt relief to injured workers at a fixed cost to the employer, without regard to questions of employer or employee fault. 2A A. Larson, *The Law of Workmen's Compensation* § 71.10, at 14-2 (1976). The LHWCA, "like most workmen's compensation legislation, * * * represents a compromise between the competing interests of disabled laborers and their employers." *Potomac Electric Power Co.* v. *Director, OWCP,* 449 U.S. 268, 281-282 (1980). To impose costs on the LHWCA arising from the fault of third parties unduly burdens the Act's essential "compromise" and bestows a windfall on third-party tortfeasors. A properly functioning workers' compensation system should maximize, rather than artificially restrict, recoveries from responsible third parties.

The assignment provisions of Section 33(b) of the LHWCA are intended to enhance the likelihood that third-party tortfeasors will be held accountable for their actions. Correctly construed, the section places control of the third-party cause of action in the hands of the injured employee — the party most likely to seek recovery. Only when the employee has been fully informed of his rights by the issuance of a formal compensation order, and then only after

the passage of six months, does control of the third-party cause of action shift to the employer. 33 U.S.C. 933(b). Thus, petitioner's position contravenes the basic purpose as well as the literal terms of Section 33(b) of the LHWCA.

The LHWCA should be liberally construed "in a way which avoids harsh and incongruous results." *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 18; *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). The Court, as it has in the past, should reject a reading of the LHWCA, such as the one proffered by petitioner, that restricts the scope of this remedial statute. *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 271; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

RICHARD G. WILKINS
*Assistant to the Solicitor General*

T. TIMOTHY RYAN, JR.
*Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

MARY-HELEN MAUTNER
*Counsel for Appellate Litigation*

SANDRA D. LORD
*Attorney*
*Department of Labor*

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